IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 2367 OF 2006

M/s. INDO INTERNATIONAL LTD. & ANR. .. PETITIONERS

Versus

STATE OF MAHARASHTRA & ANR. .. .. RESPONDENTS

Mr. U.P. Warunjikar for petitioners

Mrs. M.M. Deshmukh, APP

CORAM:-SMT. RANJANA DESAI, J.

DATED:- 17/11/2006

P.C.

. In this petition, the petitioner has prayed that the order dated 7th October, 2006 passed by the learned Magistrate, 33rd Court, Ballard Pier, Mumbai, in C.C. No. 121/S/2003 be set aside.

2. The petitioners are the accused in C.C. No.121/S/2003, pending in 33rd Court, Ballard Pier, Mumbai. The petitioners are being tried for offence under Section 138 of the Negotiable Instruments Act.

3. On 9/6/06, the petitioners made an application

before the learned Magistrate under Section 326(2) of the Code of Criminal Procedure ("Code" for short) from holding denovo trial. Section 326(2) of the Code states that, if a case is transferred under the provisions of the Code from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein and is succeeded by later.

4. According to the petitioners, since the learned Magistrate who had dealt with the case was transferred, his successor could not continue with the trial and it was obligatory for the succeeding Magistrate to have a denovo trial. By the impugned order the learned Magistrate rejected this application.

5. Mr. Warunjikar, learned counsel appearing for the petitioner has assailed the impugned order on several counts. He submitted that Section 326 of the Code empowers a Magistrate to act on the evidence recorded by his predecessor. Subsection 2 thereof provides for a transfer of a case from one Magistrate to another and the consequence thereof. However, sub-section (3) thereof expressly provides that the provisions of section 326 do not apply to

summary trials. He submitted that Section 143 of the Negotiable Instruments Act provides for cases to be tried summarily. He submitted that this Section was introduced in the Negotiable Instruments Act on 6/2/03. However, the legislature in its wisdom did not make any corresponding amendment to Section 326(1) of the Code. Therefore, it is obligatory for the learned Magistrates to follow Section 143 meticulously and if they do not follow the procedure the accused should not be made to suffer. If the Magistrate tries a summary case as a summons case then, if there is a transfer Section 326 (2) must take effect.

6. Mr. Warunjikar, fairly pointed out that the learned Single Judge of this court (D.B. Bhosale, J.) has in **Shivaji Sampat Jagtap v. Rajan Hiralal Arora & Anr., passed in Criminal Revision Application No. 252 of 2005 decided on 11th August, 2006,** taken a view that if a case in substance is not tried in a summary way, though was triable summarily, and was tried as regular summons case, it need not be heard denovo and the succeeding Magistrate can follow the procedure contemplated under Section 326(1) of the Code. Mr.

Warunjikar submitted that the facts of the case which was before this court in **Shivaji Jagtap's case (supra)** are materially different from the facts of this case. He submitted that **Shivaji Jagtap's case (supra)** pertains to the period prior to the amendment whereas the present case pertains to the period subsequent to the amendment which was introduced on 6/2/03. The said judgment will have to be, therefore, confined to its own facts.

7. Mr. Warunjikar further contended that unfortunately before the learned Single Judge, the counsel for the accused did not remain present, therefore, the accused's perspective was not presented before the learned Single Judge. Mr. Warunjikar further submitted that though the learned Single Judge has considered judgments of some High Courts, the judgment of the Patna High Court in **Raj Kumar Agrawal & Anr. v. State of Bihar, 2001(4) Crimes 264** and the judgment of Andhra Pradesh High Court in **Ramnivas Bung v. State of A.P., 1996(1) Crimes 426**, were not pointed out to him and resultantly they were not considered by him. Mr. Warunjikar submitted that in these judgments the High Courts of Patna and Andhra Pradesh have taken a different view and hence they

ought to have been brought to the notice of the learned Single Judge.

8. Mr. Warunjikar lastly submitted that whether the case is to be tried summarily or not has to be decided by the learned Magistrate only at the fag end and that stage has yet to come. He submitted that, therefore, at this stage it is not possible to conclude whether the case has been tried summarily or in any other manner.

9. I am not impressed by Mr. Warunjikar's submissions. It is true that before the learned Single Judge counsel for the accused was not present. However, bare reading of the judgment indicates that the learned Single Judge was well assisted by Mr. Naik the earlier advocate of the accused and Mr. Marwadi, the learned counsel appearing for the petitioner. Several judgments taking even a contrary view were pointed out to the learned Single Judge. It is not, therefore possible for me to hold that the point of view of the accused was not properly conveyed to the learned Single Judge. It is true that **Raj Kumar's case (supra)** and **Ramnivas Bung's case (supra)** were not cited before the learned Single Judge but at

the same time the learned Single Judge has considered several other decisions in his judgment. It is not that each and every judgment on the point must be considered by a Judge.

10. That takes me to the basic contention of Mr. Warunjikar that in the light of Section 326(2) the accused has a right to insist on a denovo trial. I have already referred to the view taken by the learned Single Judge that if the case in substance was not tried as a summary case though was triable summarily, and was tried as regular summons case, it need not be heard denovo.

11. The learned Single Judge has considered subsection 3 of Section 326 along with Section 143 of the said Act. He has considered the argument that sub-section 3 of Section 326 leaves out summary trials from the application of Section 326(1) & (2) and, therefore, in summary trials, if there is transfer of a Magistrate denovo trial must be held. He has held that, if no record as per Section 263 and 264 has been or is being maintained by the Magistrate and the case has been or is being tried as a regular summons case and not tried in a summary way as contemplated under Section 262 to

265 of the Code, such case shall not be considered as tried in a summary way, though triable summarily as provided under sub-section (1) of Section 143 of the said Act, so as to attract the provisions of Section 326 (3) of the Code. I am in respectful agreement with the view taken by the learned Single Judge.

12. There is sufficient indication in the instant case also that in substance this case is also not tried in a summary way. Therefore, this case is squarely covered by the view taken by the learned Single Judge. As to whether generally the learned Magistrates by not following meticulously Section 143 of the Negotiable Instruments Act are committing any irregularity and, if yes, what needs to be done about it is not for me to decide at this stage. For that the petitioner may if he so desires adopt some other proceedings if they are maintainable in law. For the present in my opinion since the present case is covered by learned Single Judge's judgment in **Shivaji Jagtap's case (supra)**, the instant petition cannot be entertained. I must note that Mr. Wrunjikar has not been able to persuade me to depart from the view taken by the learned Single Judge in **Shivaji Jagtap's case**

(supra). In the circumstances, the petition is rejected.

13. At this stage Mr. Warunjikar requests that this order may be stayed for four weeks. In my opinion this prayer cannot be granted. No case is made out for stay. Hence prayer is rejected.